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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

AMIN ESMAEILI,

Defendant and Appellant.

D061266

(Super. Ct. No. SCD225756)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

On June 27, 2011, after a six-day trial and less than three and one-half hours of deliberation, a jury found Amin Esmaeili guilty of assault with force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1))<sup>1</sup> with personal infliction of great bodily injury (§§ 1192.7, subd. (c)(8), 12022.7, subd. (a)) (count 1); two counts of residential burglary (§ 459, 460) (counts 2 and 4), one with a person other than an accomplice

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise specified.

present (§ 667.5, subd. (c)(21)) (count 2); attempted first degree robbery (§§ 664, 211, 212.5, subd. (a)) with personal infliction of great bodily injury (§§ 1192.7, subd. (c)(8), 12022.7, subd. (a)) and personal use of a deadly or dangerous weapon (§§ 1192.7, subd. (c)(23), 12022, subd. (b)(1)) (count 3); and failing to comply with a peace officer's lawful order (Veh. Code, § 2800), a misdemeanor (count 5). On December 12, the court sentenced Esmaeili to six years in prison on count 1—the three-year middle term for assault and three years for personal infliction of great bodily injury, with concurrent terms on the remaining counts. Esmaeili appeals, contending the court abused its discretion in denying his application for release of juror information and for further investigation of the identity of a juror who allegedly engaged in serious misconduct. Alternatively, Esmaeili contends he received ineffective assistance of counsel. We affirm.

### FACTUAL BACKGROUND

At 3:45 p.m. on August 28, 2008, the victim came home and found two men in her bedroom and bathroom. The men pushed her, and one of them struck her with something on the head and face. The men ran outside and got in a car. The victim called the police and provided a possible license plate number. The license plate number immediately led the police to a Hyundai owned by Esmaeili's brother. The Hyundai was parked outside Esmaeili's apartment and was still warm. Esmaeili told a police detective that on August 28, he got out of school at 2:45; he was home alone afterwards; and the Hyundai was parked outside all day.

The victim suffered a gaping head wound and a deeper facial wound, both requiring sutures. At the victim's home, a police officer found a window screen had been removed and the window was wide open. The victim and her husband discovered a jewelry box was missing, computer equipment had been moved and items from their closet had been placed in bags. Esmaeili was one of two major contributors of DNA on a glove left behind in the victim's kitchen.

On June 6, 2009, a witness saw three young men in the yard of neighbors who were away. The young men looked around and one of them put his hand on the neighbors' door. The witness called the police. The police found a car parked by the residence; Esmaeili was getting into the driver's seat and two companions were getting into the passenger seats. The officers attempted to stop the men at gunpoint, but Esmaeili drove away with the police in pursuit. Esmaeili stopped the car and he and his companions ran. The police found them in a nearby yard.

When the neighbors returned home, they found the door and door frame had been damaged, the garage side door had been dented, a window had been broken and a window screen had been dented and was on the ground.

#### PROCEDURAL BACKGROUND

On September 2, 2011, at a postverdict hearing, the court granted Esmaeili's motion for substitution of counsel. By that time, Esmaeili had had at least eight different attorneys, some appointed and some retained.

On October 14, 2011, Esmaeili's new counsel filed an application for disclosure of the jurors' names and addresses. Counsel's accompanying declaration stated that

Mitra Jafari, a close friend of Esmaeli's parents, attended trial every day. According to counsel, Jafari told him that during a lunch break, Juror No. 12 approached her and said, "I can go to court and vote for you. I will need one thousand dollars." The declaration described Juror No. 12 "as a male with dark hair who always wore flip flops to court and drank energy type drinks." The People filed opposition, including a declaration stating: "per the People's notes, Juror No. 12 was not a male with dark hair who wore flip flops and drank energy drinks." The court deferred ruling so it could hear testimony from Jafari and Esmaeli's parents "to determine if there was a sufficient basis to call [Juror No. 12] in."

On November 8, Jafari testified, through a Farsi-English interpreter, that she knew Esmaeli because Esmaeli's father worked for her. She had known the family for "[a]bout eight months." During the trial, Jafari sometimes sat with Esmaeli's parents and sometimes sat alone. One of the jurors looked at Jafari several times in the hallway. The juror was "No. 12," seated in the second row. He was a man, wearing sandals and carrying a cell phone, and "was texting on it from time to time." At lunchtime, just before the jury began deliberating, Jafari was with Esmaeli and his parents at a Wendy's restaurant. After lunch, Jafari waited outside the restaurant for the three Esmaelis. As Jafari "was walking this way," one of the jurors was "walking the other way." The juror faced Jafari, stopped her and said "hi." The juror said, "very quickly," "If you want me to vote in your favor, you have to give me one grand." Jafari did not know the meaning of "one grand," and asked, "What do you mean? What is it?" The juror said "it's [one thousand dollars]. If you give me a thousand dollars, I will come to the court, and I will

vote in your favor." The juror "said it very fast . . . and he went by." Jafari did not respond. The juror did not give Jafari his telephone number, a place to meet him or any method of contacting him; he did not say how she should pay him; he did not approach her again; and Jafari did not see him again. Esmaeili and his mother saw Jafari through the window of the restaurant. Esmaeili's mother came out and said, "This was a juror member. What did he have to do with you? You are not allowed to have any communication with jury members even if they approach you, and they want to talk to you. You have no right to talk to them." Jafari did not tell anyone what had happened because the court had instructed everyone not to have contact with the jurors and she was afraid she would get in trouble. Jafari realized, when the juror approached her, that it was wrong. When Jafari heard the guilty verdict, she did not think that her failure to pay the juror might have been a reason for the verdict. A week after the verdict, Jafari told her sister what had happened, and her sister told her to tell the public defender. Jafari spoke to someone who worked for the public defender, and then with the public defender. A few days after Jafari spoke with the public defender, she told Esmaeili's mother what had happened, then told Esmaeili's father. Jafari had lived in the United States for 11 years but had never attended a trial before and was not familiar with the legal system.

Esmaeili's father testified he attended the trial every day. Jafari did not talk to him about a juror asking for \$1,000 to vote in Esmaeili's favor. Esmaeili's father found out about it two or three weeks later from his wife. Jafari asked Esmaeili's father for the public defender's address.

Esmaeili's mother testified she attended the trial for two days. Five or six days after the verdict, Jafari told her that the day they were leaving Wendy's after lunch, one of the jurors said hello, then said if you give me money, I will vote in favor of Esmaeili. "[F]rom far," Esmaeili's mother saw Jafari talking to the juror outside Wendy's for one or two seconds. Esmaeili's mother described the juror as a young man, maybe 22 years old, and said "I think he was in the front row." She did not notice whether he was wearing a juror's tag. She did not report the matter to the court because she did not know what they were talking about; she asked Jafari that day and Jafari said it was nothing. Esmaeili's mother told her husband, who had not known of it until she told him.

Following the above testimony, defense counsel asked that the identity of "the juror in question" be disclosed, and stated "Jafari's story from what I got from [trial counsel] and his investigator is the same story that she told the Court here today. It's never wavered. It's never changed." In response, the prosecutor noted there were "very compelling interests to keep juror information confidential" and pointed out the several "very big leaps of logic" that Esmaeili's argument required, including the following. First, Jafari did not report the incident the day it happened, and there was a conflict between her testimony and that of Esmaeili's father concerning the manner in which she had reported the incident. Second, the juror did not contact Jafari again, or give her any way to contact him. Third, Jafari testified she did not believe her failure to pay caused the guilty verdict. Fourth, when polled individually, the jurors had said "these were [their] verdicts as read." Finally, the prosecutor stated that based on her notes, she did

"not believe that it was juror No. 12." On rebuttal, defense counsel argued that cultural differences and fear explained Jafari's failure to report the juror contact immediately.

The court found there was "sufficient basis to move forward with the further investigation into the issue" and stated "I will bring in Juror No. 12" and appoint counsel for Juror No. 12. The court said "I do not release juror information" and "I'm not necessarily going to bring in all of the jurors." Defense counsel responded "I have had very little cooperation from [trial counsel] and his office up until yesterday" and "If I can get [defense counsel's investigator's] help to ascertain exactly which juror, he might be able to clarify it." The court noted that Jafari "wasn't hedging" when she said it was Juror No. 12, and the juror in question "could have been an alternate." The court repeated that it would bring in Juror No. 12, but would not "bring in all of the jurors and let somebody take a look." The court said that if defense counsel had a basis for believing the juror in question was "one of the other jurors by number," and submitted an affidavit and gave the prosecutor a chance to respond, the court would consider the matter. Defense counsel agreed to this procedure.

On November 29, 2011, Juror No. 12 appeared before the court. The court appointed an attorney and directed Juror No. 12 to speak with counsel and return to court on December 2. After Juror No. 12 left the courtroom, his appointed counsel described him as "an older male, gray hair, very conservative."

On December 2, 2011, Juror No. 12 appeared with appointed counsel. Also present were Esmaeili, his attorney and the prosecutor. Defense counsel said Juror No. 12 was not the juror in question, and counsel had been unsuccessful in his attempts to

contact Esmaeili's previous attorney. The court noted that Jafari "was very specific" and did not waver in her testimony that Juror No. 12 was the juror in question, although she had "a lot of opportunities." The court said it would not "bring in all of the jurors." The court excused Juror No. 12 and his attorney. Esmaeili's counsel did not object, but requested a two-week continuance so he could speak with trial counsel and try to identify the juror at issue. The court denied the request, stating that if Juror No. 12 was not the one, the remainder of Jafari's testimony was called into question. Defense counsel agreed with the court's reasoning, and said he would use the issue as a basis for appeal rather than for a new trial motion.

## DISCUSSION

"[T]rial courts have always possessed the inherent power to protect jurors' physical safety and privacy." (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087.) This power is rooted in " 'strong public policies' " safeguarding the administration of justice. (*Id.* at p. 1092.) "[P]olicy-based reasons to deny [a] defendant's request for disclosure of juror identifying information . . . include[] protecting a juror's state constitutional right to privacy; the possible deterrence of prospective jurors from fulfilling their obligation to serve if they knew they would be subject to postverdict intrusions into their lives; reducing incentives for jury tampering; promoting free and open discussion among jurors in deliberations; and protecting the finality of verdicts." (*Id.* at p. 1093.) "These concerns, however, must be balanced with the equally weighty public policy that criminal defendants are entitled to jury verdicts untainted by prejudicial juror misconduct" (*id.* at p. 1092) and by "the strong competing public interest in ascertaining the truth in judicial



proceedings, including jury deliberations." (*Id.* at p. 1093.) " 'Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing public interest served by disclosure of the juror information as a matter of right in each case.' " (*Id.* at p. 1094.)

The power to protect jurors' privacy is codified in Code of Civil Procedure sections 206 and 237. "Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors . . . shall be sealed until further order of the court . . . ." (Code Civ. Proc., § 237, subd. (a)(2).) "Pursuant to [Code of Civil Procedure] Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. . . ." (Code Civ. Proc., § 206, subd. (g).) "The court shall set the matter for hearing if the petition and supporting declaration establish a *prima facie* showing of good cause for the release of the personal juror identifying information." (Code Civ. Proc., § 237, subd. (b).) "[U]pon timely motion, counsel for a convicted defendant is entitled to the list of jurors who served in the case . . . if the defendant sets forth a sufficient showing to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate

information to rule on a motion for new trial." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 551-552.)

Here, there was no abuse of discretion. (*Townsel v. Superior Court, supra*, 20 Cal.4th at p. 1096.) The court treated the accusation of juror misconduct seriously, conducted a step-by-step investigation to determine whether the accusation was trustworthy, clearly exercised its discretion at each step, and carefully evaluated each of Esmaeili's requests, all the while balancing the competing interests. The court held an evidentiary hearing at which it listened to Jafari's testimony and was able to assess her degree of confidence in identifying Juror No. 12. The court reasonably concluded Jafari was confident in her identification. The court did not err in rejecting counsel's request for a procedure akin to a lineup, an invasive course of action for which Esmaeili cites no authority.<sup>2</sup> Defense counsel was free to continue his efforts to contact trial counsel and to bring before the court any new information that his investigation revealed. When Juror No. 12 appeared before the court and it was clear that he was not the juror Jafari had described, Esmaeili's counsel properly acknowledged that fact. At that point, the court declined to grant a continuance so that Esmaeili's counsel could continue to contact trial counsel,<sup>3</sup> noting that Jafari had ample opportunity to alter her identification of Juror No. 12 but did not do so. The court reasonably concluded that this misidentification

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<sup>2</sup> For the first time on appeal, Esmaeili suggests the court could have summoned all of the male jurors. He cites no authority for this equally invasive course of action. For the first time in his reply brief, he further refines his suggestion by stating the court could have summoned "only 'young' male jurors (say, jurors under 30)."

<sup>3</sup> Esmaeili does not challenge the denial of a continuance.

undermined Jafari's entire testimony and appropriately declined to do anything more in light of her lack of credibility. In short, Esmaeili had not made a sufficient showing to support a reasonable belief that juror misconduct had occurred.

Taken in context, the court's comments such as "I do not release juror information" and "I'm not necessarily going to bring in all of the jurors" do not show, as Esmaeili asserts, that the court had a "personal policy" of not releasing juror information. The record as a whole shows the court considered each issue carefully and on its own merit, and properly placed the burden on Esmaeili to identify the juror in question. Throughout the proceedings, defense counsel had the opportunity to bring forth information identifying a juror other than Juror No. 12, but no additional information was presented. Had the issue been brought to the court's attention during trial, rather than more than three and one-half months later, the court could have immediately and easily conducted an investigation with little, if any, intrusion into the jurors' private sphere.

Esmaeili contends he received ineffective assistance from both trial counsel and counsel who represented him in the posttrial proceedings. Esmaeili asserts if the attorneys had pursued the juror identification issue diligently, and identified the juror in question or narrowed down the field of possible jurors, it is reasonably likely the court would have called the identified juror or jurors to court, at which time the witnesses could have confirmed the juror's identity. Esmaeili concludes it is probable the court would have declared a mistrial.

To prevail on this contention, Esmaeili must show that counsel failed to act in a manner to be expected of a reasonably competent attorney and that counsel's acts or

omissions prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692.) To show prejudice, Esmaeili "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

The record is devoid of any indication trial counsel actually knew about Jafari or the alleged bribe, and devoid of any indication new counsel's efforts were inadequate. Despite the fact that there were many people in the courtroom in addition to counsel who saw the jurors (investigators for both parties and court personnel), there is no evidence that any juror matched Jafari's description of the man she said approached her. Thus, no prejudice has been shown.

#### DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.